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No. 82-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WALTER PARCINSKI,
Petitioner,

v.

THE OUTLET COMPLANY, INC., and
THE EDWARD MALLEY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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Despite the hyperbole with which Respondents introduce their Counterstatement (Br. Opp. 2), and their complaint that we did not include transcript references in our Statement (*id.* 5),[1] Respondents do not take issue with any of the specific evidentiary recitals in our State-

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[1] In light of Respondents' hyperbole, we have lodged a copy of the trial transcript with the Clerk. Our statement respecting the filling of the department manager position in New Haven (Pet. 3-5, 6) is based upon Tr. 9-10, 18-19, 28-31, 33, 114-122, 126-129, 276, 307-310, 411-412, 421-422, 426-427, 456-457; see also nn.2,3 *infra*. Our statement respecting the filling of the housewares buyer position in Providence (Pet. 5, 6-7) is based upon Tr. 32-33, 35-37, 263-265, 267-269, 296, 310, 426-427, 430-431, 434-435, 464-466.

ment (Pet. 2-7).[2] Indeed, Respondents' Counterstatement does not discuss at all the two events that give rise to the

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[2] In three minor respects, Respondents quibble with our characterization of an item of evidence, in each instance without justification:

a. Respondents point out that after initially responding "Not truly" to the question whether age had been a factor, Outlet's President was asked the question again by Respondents' counsel and responded "Never." (Br. Opp. 6). Our statement recited that the witness "responded *initially*: 'Not truly' " (Pet. 6, emphasis added). It was, of course, for the jury to evaluate whether the witness' second response dissipated the implication flowing from his first, and, given that the jury returned a verdict for Petitioner, "the evidence must be viewed in the light most favorable to Petitioner, and our statement proceeds accordingly" (Pet. 2).

b. Respondents elliptically challenge (Br. Opp. 6) our statement in the petition that "Prior to deciding which employees to keep as department managers, a Vice President of Outlet met with Alfred Seigle, the merchandise manager of Malley . . . to secure Seigle's assessment of the 'relative merits' of the Malley buyers" (Pet. 3). Seigle's testimony was as follows:

> Q. Now, before June 24th when all these buyers were fired did you meet with the people from the Outlet to discuss the transition into their ownership?
>
> A. Well, I was called in one day by Mr. Steinhardt, not to discuss the transition, but to discuss the relative merits of the —some of the buyers.
>
> * * * *
>
> Q. At whose request?
>
> A. He called me.
>
> Q. What were you asked at the meeting?
>
> A. Well, he asked basically what I thought about the relative strength of a lot of our buyers. He asked me to identify those people that I thought were the strongest ones that we had. [Tr. 126-127].

Parcinski was one of the five "strongest buyers" identified by Seigle at that meeting (Tr. 128), and Seigle recommended that "even if the buying was going to be done in Providence" those five "should be retained here . . . in some capacity" (Tr. 129). The buyer actually selected in preference to Petitioner as housewares department manager was not among the five recommended by Seigle (Tr. 120, 128), and Petitioner was "extensively experienced" for that job while

discrimination claims—and hence the legal questions—at issue here: The selection of a younger, less qualified employee over Petitioner for manager of the housewares department in New Haven, and the bypassing of Petitioner in favor of a younger, less qualified employee when the buyer position in Providence became vacant. Instead, Respondents present a lengthy recitation of evidence to make a point not in issue here: that their decision to eliminate the buyer positions in New Haven and to consolidate all buying in Providence was not motivated by age.[3]

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the person selected had "minimum experience" (Tr. 122). In every aspect of the job, Petitioner was "the better" (Tr. 122). [The testimonial references cited by Respondents at Br. Opp. 6, as well as the discussion in Petitioner's Reply Brief to the court below cited at Br. Opp. 6 n.4, involve a different matter: whether Respondents ever compared the relative merits of Outlet's buyers in Providence with those of Malley].

c. Respondents hint that a desire to deprive Petitioner of a pension could not have been their motivation, as there was no certainty that Petitioner would have received a pension even had he been allowed to continue working until age 65 (Br. Opp. 6-7 and n.5). The former President of Malley testified that in Malley's history no employee had ever satisfied Malley's traditional age and service requirements (age 65 with 25 years service, Tr. 96) without being awarded a pension (Tr. 97-98), and that in 1973 he had persuaded Petitioner to turn down a higher paying job with a rival company by noting that if Petitioner remained with Malley until age 65 he would receive a pension (Tr. 99-100). One of Outlet's Vice Presidents testified that following the acquisition those Malley employees who were retained were brought under Outlet's pension plan and credited thereunder with their years of service with Malley (Tr. 358). The jury thus had evidence before it that Petitioner *would have* received a pension had he been kept on by Outlet.

[3] It is indisputed in the record that Outlet knew the exact ages of all the Malley buyers at the time that Petitioner was terminated and a younger, less qualified Malley buyer kept on as manager of the housewares department (Tr. 251-252).

I.

The first issue presented in our petition relates to the kind of evidence necessary to establish a prima facie case of discrimination. It is our contention that the Second Circuit held here that Petitioner failed to establish a prima facie case, and that that holding is in conflict with the D.C. Circuit's holding in *Aikens* v. *United States Postal Service*, 665 F.2d 1097 (D.C. Cir. 1981), *pending on writ of certiorari*, No. 81-1044. Indeed, because Petitioner's evidence here was so much stronger than that in *Aikens* we have suggested that this Court's decision in *Aikens* may establish the error of the Second Circuit in *this* case even if the District of Columbia Circuit's holding in *Aikens* is reversed. (Pet. 11-13).

Respondents dispute that this issue is presented by the decision below. According to Respondents, "the Second Circuit looked to all of the evidence as a whole and found that Petitioner had not satisfied his burden of proof...." (Br. Opp. 10). It is true that in deciding a motion for judgment notwithstanding the verdict—as contrasted with a Rule 41(b) motion at the close of the plaintiff's case—it is appropriate for a court to rule on the basis of the totality of the record and not solely on the basis of evidence presented in the plaintiff's opening case (the latter, of course, being the evidence that comprises the plaintiff's "prima facie" case). But the same legal standard controls the resolution of both motions: whether on the evidence considered in the light most favorable to the party against whom the verdict is sought there is no basis upon which a reasonable person could rule for that party. And, in most cases, as here, in practical effect, the question presented by a motion for judgment n.o.v. made by the defendant is either the same as the question whether the plaintiff has made out a prima facie case or one that *a fortiori* should be answered in plaintiff's favor if a prima facie case is determined to exist.

That is so precisely because the evidence must be considered in the light most favorable to the plaintiff. If the

plaintiff's prima facie case contained evidence from which a reasonable person could find that defendant acted with discriminatory intent, that evidence would still be in the record at the time of a motion for judgment n.o.v. Testimony in the defendant's case may supplement the evidence from which discriminatory intent may be found. But, except in the rare case where the defendant has introduced evidence which the jury is not at liberty to disbelieve,[4] evidence in the defendant's case does not as a matter of law defeat or terminate the inferences from the plaintiff's case but merely provides a basis that would "*allow*" the jury to reach a different conclusion. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 257 (emphasis added). See Pet. 14-15. Certainly, in the present case, defendant presented no evidence in its case that was not subject to disbelief by the jury. Pet. 14-15. Therefore, if plaintiff had presented a sufficient "prima facie" case, the motion for judgment n.o.v. should have been denied. When the court below declared that it was reversing the jury's verdict "[b]ecause the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants" (Pet. 6a), it was necessarily holding that Petitioner had failed to establish a prima facie case. It is accordingly correct to characterize the decision below as in conflict with the decision in *Aikens*.

Indeed, the court below apparently understood that its decision was equivalent to a ruling that Petitioner had not made out a prima facie case. Two of the decisions the court cited as supporting its ruling that "the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants" (Pet. 6a) are cases in which the sole holding was that the plaintiff had failed to establish a prima facie case (*ibid.*, citing *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981);

[4] An example would be a contemporaneous document, the authenticity of which is conceded, that irrefutably rebuts the plaintiff's testimony as to the existence of an element of his prima facie case.

Williams v. *General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981)).[5]

II.

Respondents agree that our second question presented *is* presented by the decision below. In Respondents' words (Br. Opp. 18):

> All the Second Circuit did was . . . conclud[e] that after the employer *articulates* the legitimate nondiscriminatory reason for the discharge, the *inference* of discrimination which has been created by employee's *prima facie* case is *destroyed.* [Emphasis added].

That is our understanding of the Second Circuit's holding as well (Pet. 11, 13), and for reasons explained in the petition we believe it to be an erroneous statement of the law and contrary to this Court's decisions in *Burdine* and *Pullman-Standard* v. *Swint*, —— U.S. ——, 101 S. Ct. 1781 (Pet. 14-15).

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[5] In *Stanojev*, the court's sole holding was:

> Since Stanojev was not replaced after he was fired, he was not able to establish a prima facie case by the "set of circumstances" derived from *McDonell Douglas.* Nor did Stanojev establish a prima facie case by any other method." [643 F.2d at 924].

In *Williams*, the court began its opinion as follows:

> Our conclusion, in brief, is that plaintiffs have failed to establish a prima facie case of age discrimination, and we accordingly affirm certain orders of the district court and reverse others, as detailed *infra.* [656 F.2d at 121].

Respondents apparently forget that their brief to the Second Circuit itself raised the question whether plaintiffs had established a prima facie case:

> [T]he Employer contends that the Employee never even established a prima facie case of age discrimination . . . [I]t is clear that the Employee failed even to meet that initial burden. [Cross-Appeal Brief on Behalf of Defendants-Cross-Appellees in *Parcinski* v. *The Outlet Co.*, Nos. 81-7248, 81-7298 (2d Cir.) at 37-38. See also, *id.* at 35-36].

Respondents defend the Second Circuit's holding on the ground that once a non-discriminatory reason is "articulated" by the employer, the plaintiff must lose unless he introduces (or has already introduced) "direct" evidence of discriminatory motive or explicit evidence that the articulated reason was a pretext (Br. Opp. 18-19). That is precisely the rule that is sought by the *petitioner* in another case pending before this Court on petition for certiorari, *Westinghouse Elec. Corp.* v. *Tribble*, No. 81-2202.[5] As the existence of that petition suggests, the holding below on this issue is in direct conflict with that of the Eighth Circuit in *Tribble*, 619 F.2d 1193, 1196 (8th Cir. 1982). And, contrary to Respondent's effort to distinguish *Tribble* (Br. Opp. 20-21), a reading of the Eighth Circuit's opinion makes clear that a jury verdict for plaintiff was upheld in *Tribble* in the face of an employer's "articulated" nondiscriminatory reason on the strength of a prima facie case that was far less substantial than that established by Petitioner here, 669 F.2d at 1196.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] At Pet. 16, n.13, we quote the pertinent question presented in *Tribble*.